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No. 282

# In the Supreme Court of the United States

OCTOBER TERM, 1960

ALLEN V. TORNEK, PETITIONER

*v.*

FEDERAL TRADE COMMISSION

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

## BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

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### OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit (Pet. 27-28) is reported at 276 F.2d 513. The findings, order and opinion of the Federal Trade Commission (J.A. 213-222H)[1] are not yet reported.

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[1] J.A. refers to the Joint Appendix in the court of appeals.

## JURISDICTION

The judgment of the court of appeals (Pet. 29-30) was entered on March 23, 1960. The time for filing a petition for writ of certiorari was extended to July 29, 1960 (Pet. 32), when the petition was filed. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTIONS PRESENTED

1. Whether the finding of the Federal Trade Commission that the representation by the petitioner of his Tornay Watches as 21-jewel watches was false and deceptive is supported by the record.

2. Whether it was within the discretion of the Commission to allow the petitioner's competitors to file amicus briefs in the agency proceeding.

## STATUTES INVOLVED

The principal statutes and rules of the Federal Trade Commission pertinent to the case are set out in Appendices F-H of the petition (pp. 41-46). Also pertinent are the provisions of Section 5(b) of the Federal Trade Commission Act, 52 Stat. 112 (1938), 15 U.S.C. 45(b) (1958) providing in relevant part:

> * * * Any person, partnership or corporation may make application, and upon good cause shown may be allowed by the Commission to intervene and appear in said proceeding by counsel or in person. * * *.

And Section 3.11 of the Commission's Rules of Prac-

tice, 16 C.F.R. 3.11, which provides in relevant part:

> (a) Any individual, partnership, unincorporated association, or corporation desiring to intervene in an adjudicative proceeding shall make written application in the form of a motion setting forth the bases therefor. * * *
>
> (b) The hearing examiner or the Commission may by order permit the intervention to such extent and upon such terms as are provided by law or as otherwise shall be deemed proper.

## STATEMENT

The Federal Trade Commission in its complaint (J.A. 1-6) charged the petitioner in the advertising of its watches with using unfair methods of competition and unfair and deceptive acts and practices in commerce in violation of Section 5 of the Federal Trade Commission Act. Among a number of other charges was the allegation that the petitioner had represented his watches as containing 21 jewels and that this was false, misleading, and deceptive since the four "jewels" added to the watch by a patented device "do not serve a mechanical purpose as frictional bearings." (J.A. 3)

The petitioner's watch consists of an ordinary 17-jewel watch movement with the patented "Reservoil" device attached. This device contains four "jewels" physically identical to those used in traditional watches. They are, however, not used in the same way. The Commission found that the jewels in traditional watches perform the function of bearing friction and reducing wear by providing a hard sub-

stance as a contact at a point of movement (J.A. 218). Petitioner's jewels also, allegedly, perform the function of bearing friction. However, they do not come into contact with any moving part of the watch. Because of the absence of physical contact, no friction is generated and thus none can be borne at the points where petitioner's jewels are located. Nevertheless, petitioner asserted that its jewels serve the function of bearing friction since a drop of oil is placed upon these jewels and the oil allegedly flows to the moving parts by capillary action.

After full hearings the hearing examiner entered an initial decision (J.A. 123-138) proposing dismissal of the complaint insofar as it charged that the petitioner falsely misrepresented his watches as containing 21 jewels. He found that the weight of the evidence did not support the contention that in the watch industry the use of the term "jewel" to describe a stone necessarily implies that it provides a contact at a point of movement.

On appeal the Commission allowed various parties to intervene in opposition to the petitioner to the extent of filing amicus briefs (J.A. 144, 146). In its findings of fact, conclusions and order (J.A. 213-222) and opinion (J.A. 222A-222H), the Commission reversed the examiner on the point here in issue, finding upon its evaluation of the evidence that in the watch industry and trade, "a jewel must serve a mechanical function as a frictional bearing before it is entitled to be represented as a 'jewel' and that the jewel-like stones in the Resevoil device do not serve such a function" (J.A. 220). The court of appeals affirmed (Pet. 27-28).

## ARGUMENT

1. The petitioner's argument that there is no substantial evidence to support the Commission's finding that the term "jewel", as used in the watch industry and trade, implies contact at a point of movement is based primarily on the fact that the Commission overruled its examiner on this point. The petitioner concedes that there was evidence to support the Commission's position (Pet. 18), but alleges that the Commission failed to give adequate weight to the examiner's opinion. In fact, the Commission gave careful consideration to the finding of the examiner on this point (J.A. 222C), but, after carefully considering and weighing the conflicting evidence, found that the weight of the evidence supported the adoption of a narrow definition for the term "jewel"; one not consistent with the petitioner's advertised claims. In reaching its independent judgment as to the evidence, the Commission was fulfilling its statutory function as a fact-finding agency. The Commission is obliged to consider the findings and conclusions of its examiner, as it did here, but, contrary to the petitioner's claim, it is not precluded from rejecting the examiner's findings unless they were clearly erroneous. *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474; *Federal Communications Commission* v. *Allentown Broadcasting Co.*, 349 U.S. 358.

Nor is there anything inconsistent between the Commission's finding with regard to the meaning of the word "jewel", as related to the advertising of

watches, and the patent issued for the Resevoil device. The issuance of the patent indicates that the petitioner's device is useful and novel; it does not purport to be a license to advertise watches containing the device in any particular manner. *Cf. Decker* v. *Federal Trade Commission*, 176 F.2d 461 (C.A.D.C.), certiorari denied, 338 U.S. 878.[2]

2. The petitioner's contention that the Commission's action was a violation of due process because the Commission permitted various applications to intervene as *amicus* while the appeal from the hearing examiner's initial decision was pending before it is without merit. The pertinent provisions of Section 3.11 of the Commission's Rules of Practice (p. 3, *supra*) specifically empower the Commission to permit any person, partnership or corporation to intervene "to such extent and upon such terms, as are provided by law or as otherwise shall be deemed proper." Nothing therein or in Section 5(b) of the Act precludes the Commission from granting an application to intervene after the hearing examiner has rendered his initial decision where the Commission in its discretion believes it will be aided thereby.

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[2] The petitioner's contention that the language of the court's opinion is inconsistent with the findings of the Commission (Pet. 21-25), presents no issue warranting further review. A petition for rehearing calling attention to the alleged inconsistency was denied by the court of appeals. It is thus entirely clear that the court was aware of the exact issue before it, and that its choice of language in affirming the Commission, regardless of its technical accuracy, could not be grounds for reversal.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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